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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 50

F. STRAUSS & SON, INC., OF ARKANSAS
Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of The Tax Court of the United States, (R.32-34) was reported at 28 T.C. 65. The opinion of the Court of Appeals, (R.38-44) is reported at 251 Fed. (2d) 724.

JURISDICTION

The judgment of the Court of Appeals (R.44-45) was entered on January 24, 1958. A timely Petition for Rehearing, filed February 13, 1958 (R.45), was denied on the 3rd day of March, 1958. Petition for writ of certiorari was granted May 26, 1958 (R.46). The jurisdiction of this

Court is invoked under 28 U.S.C.A., paragraph 1254 -(1), and Sec. 7482, Internal Revenue Code of 1954.

STATUTE, REGULATION, AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

The statute (Section 23 (a) (1) (A), I.R.C. of 1939), and regulation (Section 29.23 (q)-1, Regulations 111), directly involved are set forth in Appendix pp. a-1 through a-2, *infra*.

Since state constitutional provisions are also incidentally involved, these have also been set forth in Appendix. These are constitutional provisions relating to Initiative and Referendum (Appendix pp. a-2—a-4).

QUESTIONS PRESENTED

1. Whether payments by a corporate taxpayer to an organization established and utilized for the purpose of carrying on a publicity program designed to defeat an initiative measure submitted to the voters at large, which measure, if passed, would have destroyed the taxpayer's business, are deductible as ordinary and necessary business expenses under Section 23 (a) (1) (A), I.R.C. of 1939.

2. Whether a regulation forbidding deduction of expenditures for ". . . the promotion or defeat of legislation, the exploitation of propaganda" . . . may properly be construed to bar deduction as a business expense of legitimate expenditures made to carry on a publicity program to defeat an initiative measure submitted to the people at large, passage of which would have destroyed the business involved, and, if so construed, whether same is valid.

STATEMENT OF THE CASE

Petitioner, an Arkansas corporation, had duly and timely filed a petition in The Tax Court of the United States requesting a redetermination of an asserted deficiency in income tax in the amount of $20,990.36 for the calendar year 1950.

There were two issues originally involved; first, the disallowance of a deduction based on a payment in 1950 by petitioner in the amount of $9,252.67 to Arkansas Legal Control Associates, Inc., either as a business expense under Sec. 23 (a) (1) (A) or as a contribution under Sec. 23 (q), and secondly, whether petitioner was liable to the surtax imposed by Section 102 of the Internal Revenue Code of 1939 (Petition, R.3-4). The Section 102 issue was settled, leaving only the issue of disallowance of the claimed deduction, by stipulation that if Petitioner should prevail with respect to the issue still in controversy the Court should determine a deficiency of $6,500.00, and if the Respondent should prevail the court should determine a deficiency of $10,386.12 (Paragraph 10 of Stipulation, R.17-18).

Most of the facts were stipulated (R.10-25) and were made a part of the findings of the Tax Court (R.27).

In 1950 Petitioner, an Arkansas corporation, was engaged in the wholesale liquor business (R.25; Findings, R.27). Subject to provisions for county-wide local option (Sec. 48-801 and Sec. 48-807, Ark. Stats. Ann. of 1947), the sale of intoxicating liquor had been legal in Arkansas since 1935 (Findings, R.27; see also R.25). (See also Sections 48-305, 48-306, and 48-308, Ark. Stats., 1947, Ann.)

An initiated petition calling for an election on state-wide prohibition was placed on the ballot and voted on

in the General Election held in the State of Arkansas on November 7, 1950. The general purpose of the act, as the ballot title implied, was to make it unlawful to manufacture, sell, barter, loan or give away intoxicating liquors within the State of Arkansas, or to export from, import to, or transport the same within the State of Arkansas (Par. 4 of Stipulation, R.12) (Findings, R.27). Passage of the act would thus have necessarily put Petitioner out of business (R.25).

In May of 1950, nine liquor wholesalers, including petitioner, formed the Arkansas Legal Control Associates, Inc., as a non-profit organization pursuant to the provisions of state law (Findings, R.27) (R.12,25). The sole purpose of the wholesalers in forming this organization was to provide means of coordinating their efforts to persuade the general public, by advertising, to vote against the proposed prohibition act (Findings, R.27) (R. 25).

Between May and November, 1950, contributions totaling over $126,000.00 were received by Arkansas Legal Control Associates, Inc., and during that period it paid out over $100,000.00 for direct advertising through newspapers, radio, billboards and other media (Stip. R.13, 14, Ex. 5-E at R.19) (Findings, R.30). Such advertising contained reasons and statistics designed to convince the voters to defeat the act (Par. 7 of Stipulation, R. 14,15,16, Exhibits 7-G and 11-K at R.21,22) (Findings, R.30). The Statewide Prohibition Act was in fact defeated (Par. 4 of Stip., R.13) (Findings, R.30).

The case was duly submitted on the pleadings, the Stipulation and Exhibits thereto, and oral testimony. The court determined that the contribution made by petitioner in 1950 to the Arkansas Legal Control Associates, Inc., was neither deductible as a business expense under Sec.

23 (a) (1) (A) of the Internal Revenue Code of 1939, or as a contribution under Sec. 23 (q) of the Internal Revenue Code of 1939 (R.26-32).

The court held for respondent primarily upon the ground that the regulation involved (Sec. 29.23 (q)-1, Regulations 111) was applicable and valid (R.30-32).

From this decision the petitioner duly prosecuted a Petition for Review (R.32-36). In its brief before the Court of Appeals, petitioner abandoned any contention under Sec. 23 (q), so that the only question for consideration by the Court of Appeals (and the only one considered, R.39) was the deductibility of the payment as a business expense under Sec. 23 (a) (1) (A). The court below held (R.40-44) that the regulation involved was applicable and valid, and further rested its decision on the ground that, quite apart from the regulation, the expenses were not ordinary and necessary (R.42).

SUMMARY OF ARGUMENT

I. *The expenses were ordinary and necessary.*

Apart from the Regulation, the expenses meet all tests of deductibility.

Expenses of attempting to defeat the imposition of Prohibition are hardly unusual in the life of a liquor business. They were therefore clearly "ordinary". *Welch v. Helvering*, 290 U.S. 111, 114, 78 L. Ed. 212, 214, 54 S. Ct. 8 (1933); *Deputy* v. *Dupont*, 308 U.S. 486, 495, 84 L. Ed. 416, 6 S. Ct. 96, (1940); *Comm.* v. *Heininger*, 320 U.S. 467, 471, 88 L. Ed. 171, 64 S. Ct. 249 (1943).

Similarly, the expenditures made were clearly appropriate and helpful. They were, therefore, "necessary". Welch v. Helvering, *supra*. Comm. v. Heininger, *supra*.

McDonald v. *Comm.,* 323 U.S. 57, 89 L. Ed. 68, 65 S. Ct. 96 (1944) is not to the contrary. That case involved the attempted deduction of expenses to achieve ownership of a business which the taxpayer did not own, and to which he had no claim. The instant case involved the attempt preserve the i n c o m e of a presently existing b u s i n e s s owned by the taxpayer. The expenses were therefore deductible as a necessary means of defense against attack. Comm. v. Heininger, *supra, Lilly* v. *Comm.,* 340 U.S. 90, 96 L. Ed. 769, 72 S. Ct. 497 (1951), *Kornhauser* v. *U. S.,* 276 U.S. 145, 72 L. Ed. 505, 58 S. Ct. 219.

II. *No public policy or illegality prevents the deduction.*

Expenses otherwise deductible may not be disallowed for reasons of public policy unless an allowance of the deduction frustrates sharply defined national or state policies proscribing particular types of conduct evidenced by some governmental declaration thereof. *Tank Truck Rentals, Inc.* v. *Comm.,* 356 U.S. 30, 2 L. Ed. (2d) 562, 78 S. Ct. 507 (1958); Comm. v. Heininger, *supra.*

It is self-evident that public policy here encourages the expenditures. The First Amendment to the Constitution of the United States and Amendment #7 to the Constitution of the State of Arkansas, providing for the initiative and referendum, additionally underline such encouragement.

III (a). *The regulation is not applicable.*

Words in revenue acts should be interpreted in their normal, everyday meaning. *Crane* v. *Comm.,* 331 U.S. 1, 6; 91 L. Ed. 1301, 1306 (1946); *Helvering* v. *William Flaccus Oak Leather Co.,* 313 U.S. 247, 249, 85 L. Ed. 1310, 1311. The word "legislation" normally does not contemplate action by the people themselves. *Luther Ely*

Smith, 3 T.C. 696, 702 (1944); Webster's New International Dictionary of the English Language, Second Edition, 1945, page 1412.

In any event, the regulation should be interpreted to apply only to improper, illegal or immoral efforts to influence legislation. Lucas v. Wofford, *infra,* Los Angeles & Salt Lake Railroad Company, *infra*; Textile Mills Corp. v. Comm., *infra.*

The construction suggested avoids any contention that the regulation is invalid as an improper interpretation of the statute, and should be favored. *Newman* v. *Comm.,* 76 Fed. (2d) 449, 452 (C.C.A. 5th). A contrary construction further may well violate the First Amendment to the Constitution of the United States as, in effect, a penalty for engaging in the right of free speech and petition; *Speiser* v. *Randall,* 78 S. Ct. 1332, 1338, June 30, 1958.

The regulation should be construed to avoid such grave constitutional doubt. *U. S.* v. *Rumely,* 345 U.S. 41, 47, 97 L. Ed. 770 (1953); *U. S.* v. *Delaware & Hudson Co.,* 213 U.S. 366, 407, 408, 53 L. Ed. 836, 29 S. Ct. 527; *U. S.* v. *C.I.O.,* 335 U.S. 106, 120, 121, 92 L. Ed. 1849, 1860, 1861, 68 S. Ct. 1349.

III (b) *The regulation involved as applied to these facts is invalid.*

It has been demonstrated that the expenses are, apart from the regulation, clearly deductible. Therefore, for the regulation to attempt to deny the deduction under these particular circumstances is a misapplication and a misconstruction of the statute. It is, therefore, to that extent, invalid. *Bingham Trust Company* v. *Comm.,* 325 U.S. 365, 377, 89 L. Ed. 1670; *M. E. Blatt Co.* v. *U. S.,* 305 U.S. 267, 279, 83 L. Ed. 167, 172.

Textile Mills Corp. v. *Comm.*, 314 U.S. 326, 86 L. Ed. 249 (1941), is not to the contrary. It upheld the validity of the regulation only as applied to situations of doubtful legality or morality, specifically as applied to expenses made pursuant to a contingent fee contract to procure legislation. Such contract was clearly illegal. *Gesellschaft Fur Drahtlose Telegraphie M.B.H.* v. *Brown*, 64 App. D. C. 357, 78 Fed. (2d) 410; *Brown* v. *Gesellschaft Fur Drahtlose Telegraphie M.B.H.*, 70 App. D. C. 94, 104 Fed. (2d) 227, certiorari denied 307 U.S. 640, 59 S. Ct. 1038, 83 L. Ed. 1521; *Crocker* v. *U. S.*, 240 U.S. 74, 79, 60 L. Ed. 533, 537; *Hazelton* v. *Sheckells*, 202 U.S. 71, 79, 50 L. Ed. 939, 941.

Without determining whether the contract was invalid or not, but noting it was of dubious validity, this Court upheld the regulation as applied to such situations of doubtful legality only. It went no further.

The so-called "Re-enactment Rule" does not support the regulation.

That rule only applies when the interpretation is well settled and long continued. *McGaughan* v. *Hershey Chocolate Co.*, 283 U.S. 488, 492, 75 L. Ed. 1183; *U. S.* v. *Dakota-Montana Oil Co.*, 288 U.S. 459, 466, 77 L. Ed. 893, 897; *Helvering* v. *Winmill*, 305 U.S. 79, 83, 83 L. Ed. 53. The last re-enactment prior to 1950, the year in question, was 1939. Up to that time the courts generally approved expenses of influencing legislation, if done in a legitimate and ethical manner. *Lucas* v. *Wofford*, 49 Fed. (2d) 1027 (5th Cir., 1931); *Los Angeles & Salt Lake Railroad Company*, 18 B.T.A. 168 (1929); *Texas & Pacific Railway Co.* v. *United States*, 52 Fed. (2d) 1040 (Court of Claims, 1931), affirmed on other issues, 286 U.S. 295 (1932); *Sunset Scavenger Company, Inc.* v. *Comm.*, 84 Fed. (2d) 453 (1936), *contra*. At best, the construction of the statute

was not settled by 1939, and it has not been re-enacted since.

Assuming the doctrine of re-enactment can be extended to an acquiesence by long silence, even so, all that has been re-enacted has been the holding of *Textile Mills* as qualified by Luther Ely Smith, *supra*. Indeed, apart from Luther Ely Smith, Textile Mills applied the regulation only to items of doubtful legality or morality. Congress could not by silent acquiesence re-enact any different meaning.

ARGUMENT

I

THE EXPENSES INVOLVED WERE, FACTUALLY, ORDINARY AND NECESSARY

The real issue for decision in this case—the applicability and validity of the regulation involved—is both intensified and simplified by first considering this case without it.

Apart from the regulation, we submit, there is no question but that the expenses here involved were both ordinary and necessary.

"Whether an expenditure is directly related to a business and whether it is ordinary and necessary are doubtlessly pure questions of fact in most circumstances"; Comm. v. Heininger, *infra*.

Here we have expeditures made for the purpose—and the sole purpose, at that—of avoiding destruction of an existing business.

It is difficult to conceive that such expense was not "ordinary", as the term is employed in the statute. Certainly what was done was not an unusual occurrence in the life of the business group or the community of which

this taxpayer was a part; *Welch* v. *Helvering*, 290 U.S. 111, 114, 78 L. Ed. 212, 214, 54 S. Ct. 8; (1933); *Deputy* v. *Dupont*, 308 U.S. 486, 495, 84 L. Ed. 416, 6 S. Ct. 96, (1940). Indeed, what this taxpayer did was merely a "common and accepted means of defense against attack"; Welch v. Helvering, p. 114, *supra*. It was the "response ordinarily to be expected"; *Comm.* v. *Heininger*, 320 U.S. 467, 471, 88 L. Ed. 171, 64 S. Ct. 249 (1943).

It is even more difficult to conceive that this expense was not "necessary" in the accepted meaning of that word. What was done was clearly, in the judgment of the taxpayer, (at the least) "appropriate and helpful, and therefore necessary"; it was an attempt to accomplish something beneficial to taxpayer's business; Comm. v. Heininger, *supra*, page 471, Welch v. Helvering, *supra*; see also *Comm.* v. *Pacific Mills*, 207 Fed. (2) 177, 180.

The Treasury has recognized the test as a practical one. For example, in its Regulations the Treasury indicates that contributions "which bear a direct relationship to the corporation's business and are made with a reasonable expectation of a financial return commensurate with the amount of the donation" are deductible business expenses (Regulation 111, Sec. 29.23 (a)-13).

From these Regulations and from Welch v. Helvering we learn that it is not essential for a finding of "necessity" that the expenditure be actually appropriate or helpful; it is sufficient that it is reasonably expected to prove so. The judgment of the taxpayer in this connection will not be lightly overturned. Welch v. Helvering, *supra*, page 113.

But here we have no fine questions of whether the taxpayer was incurring expenditures which were, from a factual viewpoint, reasonably necessary to his business. These expenses, from the taxpayer's viewpoint, were vital to this taxpayer's very existence. So far as this peti-

tioner was concerned, the initiated act before the people was a smoldering ember, which, in the absence of preventative measures, would have become a conflagration destined surely to destroy petitioner's business. Particularly appropriate here is the quotation from *Heininger* v. *Comm.*, 133 Fed. (2d) 567, 570, noted with approval by this Court in the Lilly case, *infra*:

> ". . . Without this expense, there would have been no business. Without the business, there would have been no income. Without the income, there would have been no tax. To say that this expense is not ordinary and neecssary is to say that that which gives life is not ordinary and necessary."

The court below, relying on *McDonald* v. *Comm.*, 323 U.S. 57, 89 L. Ed. 68, 65 S. Ct. 96 (1944) felt nevertheless that the expenses here were not necessary for the "carrying on" of this petitioner's business; that petitioner was empowered to conduct a liquor business, not to conduct political campaigns.

We suggest the argument goes too far. It is not what was done but its relationship to petitioner's business that counts. Petitioner here was not organized to advertise or carry on a trucking business any more than it was to make campaign contributions. Yet none would deny the deductibility of its ordinary advertising and delivery expense so long as they related to its business. Indeed, presumptively at least, every action of this corporate taxpayer not clearly *ultra vires* was done for a business purpose.

We note at the outset that the McDonald case was ultimately rested upon the now abrogated* rule of the

*Sec. 1141 (a) of the 1939 Code, as amended by Sec. 36 of Pub. Law 773, 80th Congress, 2nd Session, effective Sept. 1, 1948, and its 1954 counterpart, Sec. 7482, both provide that Tax Court decisions are reviewable, ". . . in the same manner and extent as decisions in the district courts in civil actions tried without a jury."

Dobson case (*Dobson* v. *Comm.*, 320 U.S. 489), and, to some extent, upon public policy, page 64; see also page 69.

The McDonald case was applicable to a particular situation and should be so confined. In that case the issue involved the right of a candidate to deduct party assessments and campaign expenditures. We suggest that in the word "candidate" lies the key to the distinction. Whether McDonald was a candidate for election or re-election, he was a candidate only; he had no rights of ownership, of income or otherwise in the future term of office which he sought. His rights related solely to the office which he was then holding for a specific period. He sought neither to defend *that* term of office nor preserve it. *Whether he won or lost, his rights to income from that particular office were and would remain unaffected by his expenditures.* Consequently, the expenses claimed, as this Court appropriately pointed out, were not expenses related to the conduct of or carrying on of that business. If such expenditures related, directly or indirectly, to income, they were related to the procurement of income from a business or office to be achieved *in futuro.* McDonald expended sums for the purpose of endeavoring to achieve an income or business status for future years, and to which he had no claim of right. The corporate taxpayer here, however, had both present and long-standing rights of ownership in an existing business and the income therefrom. The expenditures it made could well have affected—and vitally—the present flow of that income. Not only was the action of this taxpayer "ordinary" and "necessary", its action represented the most basic tenet of nature—the law of self-preservation. But McDonald preserved nothing. Indeed, he owned nothing to preserve, unless it was the balance of his then existing term; and that, as we have pointed out, could not be affected by his action. McDon-

ald's situation would be more akin to that of petitioner's if legislation had been proposed to abolish the judicial office to which he had already been appointed, or if he had been impeached. Failing that, he, like any other political aspirant, was a mere candidate for a business he had not yet achieved.

This Court has allowed expenses of resisting a fraud order condemning a dentist's business; *Comm.* v. *Heininger, supra.* If expenses of trying to convince a court that taxpayer should be permitted to stay in business are allowable, why not expenses of trying to convince the voters? Cf. also *Lilly* v. *Comm.*, 340 U.S. 90, 96 L. Ed. 769, 72 S. Ct. 497, (1951), where this court allowed expenses of "kickbacks"—expenses without which the business could not continue in existence. What can be more fundamentally related to the carrying on of a business than an involuntary defense against attack? The case at bar represents that basic defense against attack, a defense nonetheless imperative or necessary because the attack is by legislation rather than by suit. Cf. *Kornhauser* v. *U. S.*, 276 U.S. 145, 72 L. Ed. 505, 58 S. Ct. 219.

To hold that amounts expended to prevent potential destruction of this petitioner's business were not ordinary and necessary is to ignore "the ways of conduct and forms of speech prevailing in the business world"; Comm. v. Heininger, *supra*, page 472.

II

NO PUBLIC POLICY OR ILLEGALITY PREVENTS THE DEDUCTION

This Court has now made quite clear that expenses otherwise deductible may not be disallowed for reasons of public policy unless the allowance of the deduction frustrates sharply defined national or state policies

proscribing particular types of conduct evidenced by some governmental declaration thereof. Comm. v. Heininger, *supra;* Lilly v. Comm., *supra; Tank Truck Rentals, Inc.* v. *Comm.,* 356 U.S. 30, 2 L. Ed. (2d) 562, 78 S. Ct. 507 (1958).

That the expenses here involved were not illegal or immoral or against public policy—the expenses for an open appeal to the voters—is too obvious, we think, to require extended discussion. Indeed, the very fact that the State of Arkansas has, by Amendment Seven to its Constitution (Appendix a-3), reserved powers of lawmaking to the people through the initiative and referendum clearly contemplates that there must be expenses of presentation of the views of the antagonistic forces. And if the First Amendment to the Constitution of the United States does not—as indicated hereinafter—strike down the regulation involved, it certainly gives a strong undercurrent of approval to expenses of this kind.* "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern . . ." *Thornhill* v. *Alabama,* 310 U.S. 88, 101, 84 L. Ed. 1093, (1940). If there is any public policy involved here, state or federal, it is clearly a policy which would or should

*This court may also judicially notice the established practice on the part of congressional committees of soliciting public testimony, both by general announcement and by invitations to interested individuals. Cf. Press release of House Ways and Means Committee announcing public hearings on June 16, 1953, et seq., relating to tax revision, published New York Times, May 14, 1953, sec. 1, page 1, column 2. The importance to Congress of providing for public participation in legislative processes finds statutory recognition in provisions such as 2 U.S.C. § 190 (b), authorizing and regulating hearings before Senate standing committees, and 2 U.S.C. § 192, prohibiting refusal by a witness to testify or to produce papers. These provisions reflect a national policy of ensuring the adequate presentation and dissemination of private views respecting matters of public concern. The Federal Regulation of Lobbying Act, 60 Stat. 839 (1946), 2 U.S.C. §§ 261-270 (1952), further implements this policy by permitting proper "lobbying".

encourage the necessary publicity here involved. Not only is no public policy, state or national, not frustrated here; disallowance of the deduction frustrates the public policies evidenced by the First Amendment to the Constitution of the United States and the Seventh Amendment to the Constitution of the State of Arkansas.

Thus far, in our discussion, therefore, we have expenses which are ordinary and necessary in the accepted sense of the word, and which are violative of no public policy, evidenced by governmental declaration or otherwise.

This points up the basic question in this case: May the Government, by ambiguous regulation—howsoever long continued—disallow expenditures clearly allowable under the statute without it?

In consideration of this question, it should be remembered that the broad, fundamental purpose of our income tax laws is to tax "net, not ... gross income", McDonald v. Comm., *supra*. The purpose is "to tax earnings and profits less expenses and losses"; *Higgins* v. *Smith*, 308 U.S. 473, 477; 84 L. Ed. 406, 410; 60 S. Ct. 355 (1940).

III

THE REGULATION IS NEITHER APPLICABLE NOR VALID IF AND AS APPLIED TO THESE FACTS

(A) *The Regulation does not apply.*

If one does not end with the words used in the regulation, "one certainly begins there"; *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349; 85 L. Ed. 881 (1941).

Lobbying has been construed to be limited to representations made directly to Congress, its members or

committees, *U. S.* v. *Rumely*, 345 U.S. 41, 47, 97 L. Ed. 770 (1953), as contrasted to statements directed to the public at large attempting to influence by publicity the thinking of the community; see also *U. S.* v. *Harris*, 347 U.S. 612, 625, 98 L. Ed. 989. It is true this construction was made in order to avoid constitutional issues, but certainly this is, as this Court intimated, its normal meaning, in any event. Further, as pointed out more specifically hereafter, there are equally grave constitutional issues present here.

Likewise, the phrase "legislation" *ordinarily* refers to statutory enactments by representatives of the people, as contrasted to lawmaking by the people themselves. The definition of legislation in Webster's New International Dictionary of the English Language, 2nd Edition, 1945, p. 1412 states:

> ". . . Jurisprudence, the making of laws by express decree or enactment, either by the supreme lawmaking power, as a king, council, legislature, etc., or by any person or body exercising the lawmaking power by delegation or in sub-ordination, as judges, committees, town or city councils, health boards, various executive officials, etc. Also, the laws that are so enacted."

The regulation involved, strictly speaking, simply does not cover the activity involved, there being no "legislation". As in *Luther Ely Smith,* 3 T.C. 696, 702 (1944), (involving an amendment to the Constitution by initiative petition), the association here involved ". . . engaged in no lobbying of any kind before any legislative body. No legislation was needed or involved in its plan. It contemplated an amendment to the Constitution proposed by the initiative of the people. . . ."

Although it is true that the word "legislation" can be interpreted to include the initiative and referendum,

that is not its meaning in normal parlance—and Revenue Acts should be interpreted in their "ordinary, everyday senses"; *Crane* v. *Comm.*, 331 U.S. 1, 6; 91 L. Ed. 1301, 1306, (1946); Deputy v. Dupont, *supra*, page 498; McGaughan v. Hershey Chocolate Co., *infra; Helvering* v. *William Flaccus Oak Leather Co.*, 313 U.S. 247, 249, 85 L. Ed. 1310, 1310. Even if it can be said initiated or referred acts properly fall within the term "legislation", the "promotion" and "defeat" of legislation referred to in the regulation should be construed to refer to promotion or defeat of legislation by procedures of doubtful legal, moral or ethical standing. Cf. Los Angeles and Salt Lake Railroad, *infra*. As pointed out in *Jerry Rossman Corporation*, 175 Fed. (2d) 711, ". . . there are 'penalties' and 'penalties', and . . . some are deductible and some are not," so, here, there should be 'expenses of influencing legislation' and 'expenses of influencing legislation'. This was the position almost uniformly followed prior to Textile Mills, *infra* (see pages 25 to 29 of this brief), and was, as is argued more in detail hereafter, the true meaning of that case itself.

We have argued hereafter that a contrary interpretation would be invalid as inconsistent with the Statute. The construction suggested avoids such a contention and so should be favored; Newman v. Comm., *infra*.

Further, grave constitutional issues would arise from a construction that a tax deduction, otherwise allowable, may be denied on exercising basic rights of free speech in a completely legitimate manner. In the domain of the indispensable liberties, abridgement of such rights, even though unintended, may inevitably follow varied forms of governmental action. Cf. *National Ass'n for Adv. of Col. People* v. *Alabama*, and cases there cited; 78 S. Ct. 1163, 1171, June 30, 1958.

And it is now clear that a denial of a tax exemption or deduction may be as much a denial of free speech as direct action; *Speiser* v. *Randall*, 78 S. Ct. 1332, 1338; June 30, 1958. This Court said:

> "It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. * * * It is settled that speech can be effectively limited by the exercise of the taxing power. *Grosjean* v. *American Press Co.*, 297 U.S. 233. To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that because a tax exemption is a 'privilege' or 'bounty' its denial may not infringe speech."

It would seem to follow that, if, as we have postulated, the deduction is otherwise allowable, the denial of the deduction based on the character of the speech in effect amounts to an unconstitutional penalty exacted on its exercise.

It is not contended that Congress could not repeal the statute allowing business deductions; at least, we assume that it could. Likewise, California could not be compelled to grant a property tax exemption to veterans and churches; but once it did grant the exemption, it could not exclude those veterans and churches which refused to sign non-communist affidavits. Speiser v. Randall, *supra*. Similarly, to permit the dentist the right to deduct the expenses of saving his business, to permit other taxpayers the right to deduct similar expenses of preserving their business, but to deny this taxpayer the right to that very same deduction because of what he says, clearly amounts to a discriminatory denial of a deduction because and only because of engaging in speech. What difference, in-

deed, is there in taxing this petitioner for advocating the defeat of this proposal, cf. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 80 L. Ed. 660 (1936), and in withholding a deduction, *otherwise available*, because of such advocacy?

But whether the construction sought by the respondent would violate the right of free speech and petition of the First Amendment need not be here decided. It need only be recognized that to construe it as all embracing, as covering the exercise of the most sovereign rights possessed by a free people, seriously raises those constitutional spectres. It is fundamental that the construction, if at all fairly possible, must be such as to avoid the constitutional pitfalls. *U. S.* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407, 408, 53 L. Ed. 836; 29 S. Ct. 527; *U. S.* v. *C. I. O.*, 335 U.S. 106, 120, 121; 92 L. Ed.; 1849, 1860, 1861, 68 S. Ct. 1349; U. S. v. Rumely, *supra; U. S.* v. *Harris, supra.*

"Lobbying" and "propaganda", as used in the Regulation seem to imply something sinister or pernicious, or to suggest illegal or unethical activities. Cf. Los Angeles & Salt Lake Railroad, page 118, *infra*, and Lucas v. Wofford, *infra.* Similarly "promotion" or "defeat" of "legislation", as pointed out, normally would seem to have reference to attempted influence of acts by legislators, or at least to attempted influence of some type subject to the possibility of corruption or impropriety. After all, the regulation is attempting to define what is "necessary". It is difficult to conceive that something which is otherwise appropriate and helpful to the conduct of a business becomes not "necessary" merely because it is an attempt to influence legislation—at least unless it borders on the illegal, and therefore was not "necessary". Cf. Tank Truck Rentals, *supra*, and *Comm.* v. *Sullivan*, 2 L. Ed. (2d) 559. It would accord-

ingly seem that such phraseology in the regulation would not ordinarily have reference to legitimate expenditures, completely free of taint from law or morals, openly advocating defeat of laws initiated and passed on by the people as a whole. Certainly so to interpret it is "not barred by intellectual honesty". Certainly, so to interpret it is in "the candid service of avoiding" serious constitutional doubt as to its validity; U. S. v. Rumely, *supra*, page 47.

(B) *The Regulation involved is invalid as applied to the facts of this case.*

This case, simply stated, represents the attempt of a taxpayer to defend his business against destruction. So long as he goes about such defense in a legitimate manner, no more necessary course of conduct can be conceived. By hypothesis, under the statute, such expense is both "ordinary" and "necessary". There is no logic nor reason in the regulation which says this is not so merely because such expense is an expense of influencing legislation.

The Regulation, in thus attempting to disallow a deduction otherwise clearly allowable under the Statute, is, to that extent, invalid as an improper extension of the Statute, *Bingham Trust Company* v. *Comm.*, 325 U.S. 365, 377, 89 L. Ed. 1670; Cf., *M. E. Blatt Co.* v. *U. S.*, 305 U.S. 267, 279, 83 L. Ed. 167, 172, (1938); *Miller* v. *U. S.*, 294 U.S. 435, 440; 79 L. Ed. 977 (1935); *Newman* v. *Comm.*, 76 Fed. (2d) 449, 452 (C.C.A. 5th), cert. den. 296 U.S. 600, 80 L. Ed. 425, unless its validity is either supported by the so-called re-enactment rule, or the holding of this Court in *Textile Mills Corp.* v. *Comm.*, 314 U.S. 326, 86 L. Ed. 249 (1941).

It was on both of these supports that the Court below rested its decision. We respectfully submit that the Court erred.

(1) Textile Mills upheld the validity of the Regulation only as applied to situations of doubtful legality or morality.

It was our position below—and is our position here—that the thrust of that decision was limited to activities illegal or contrary to public policy. The Court below, however, adopted the theory, as urged by Respondent, that Textile Mills sutained the validity of the Regulation in its entirety.

In the Textile Mills case, the property of certain German companies had been seized during World War I. The taxpayer, a corporation, was employed to procure remedial legislation on a contingent fee contract. The taxpayer was to bear all expenses of the attempt. As a result of the efforts of the taxpayer in 1928, legislation (the Settlement of War Claims Act of 1928, 45 Stats. 791) was passed restoring the property to the German owners. The taxpayer corporation was paid its fee. It claimed deduction for the amount paid to its publicists and two lawyers employed by it. The Commissioner disallowed the deduction and this Court sustained the disallowance. The Regulation involved was the same as the one here involved. This Court held:

> "Nor has the administrative agency usurped the legislative function by carving out this special group of expenses and making them non-deductible. We fail to find any indication that such a course contravened any Congressional policy. *Contracts to spread such insidious influences through legislative halls have long been condemned. Trist* v. *Child* (*Burke* v. *Child*), 21 Wall. (U.S.); *Hazelton* v. *Sheckells*, 202 U.S. 71, 50 L. Ed. 939, 26 S. Ct. 567, 6 Ann. Cas. 217. *Whether the precise arrangement here in question would violate the rule of those cases is not material.* The point is that the general policy indicated by those cases need not be disre-

garded by the rule-making authority in its segregation of non-deductible expenses. *There is no reason why, in the absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from the family of contracts to which the law has given no sanction.* The exclusion of the latter from 'ordinary and necessary' expenses certainly does no violence to the statutory language. *The general policy being clear it is not for us to say that the line was too strictly drawn*" (emphasis supplied).

Petitioner recognizes that, with a minor exception not worth noting, there was no insidious activity on the part of the taxpayer in that case. But it was not what was actually done which brought public policy into play; it was what *might* have been done under the contingent contracts to procure favorable legislation. *It was the contracts in the Textile Mills case that were void as against public policy, not what was actually done under them.* It was this fact that cast a shadow on the expenses thereunder.

The opinion of the Third Circuit in the Textile Mills case, 117 Fed. (2d) 62, makes clear that it was what might have been done, and not what was done that caused the contracts to be null and void, stating:

"The contracts between the taxpayer and its clients were to procure 'favor legislation' as distinguished from 'debt legislation'. See the cases cited, page 229 of 78 Fed. (2d), note 7 to Brown v. Gesellschaft Fur Drahtlose Telegraphie M. B. H., *supra.* Compensation for procuring the legislation was upon a contingent basis. *In the light of both of these considerations, the contracts were null and void. The services performed by the taxpayer and its agents were rendered without suggestion of*

> *corruption* and, with the exception hereinafter referred to, were not unethical, *but* as was stated in *Hazelton* v. *Sheckells*, 202 U.S. 71, 79, 26 S. Ct. 567, 568, 50 L. Ed. 939, 6 Ann. Cas. 217, '*the objection to them rests in their tendency, not in what was done in the particular case.*' Such contracts as were here made possess a tendency unduly to influence legislative action and to destroy the integrity of legislative institutions" (emphasis supplied).

The Court specifically pointed out that the contracts for allegedly procuring the very legislation involved in the Textile Mills had been held in two other cases to be invalid as against public policy; *Gesellschaft Fur Drahtlose Telegraphie M. B. H.* v. *Brown*, 64 App. D. C. 357, 78 Fed. (2d) 410, and *Brown* v. *Gesellschaft Fur Drahtlose Telegraphie M. B. H.*, 70 App. D. C. 94, 104 Fed. (2d) 227, certiorari denied 307 U.S. 640, 59 S. Ct. 1038, 83 L. Ed. 1521.

Long prior to Textile Mills contingent contracts to obtain legislative results had been ruled void as against public policy. *Crocker* v. *U. S.*, 240 U.S. 74, 79; 60 L. Ed. 533, 537; *Hazelton* v. *Sheckells*, 202 U.S. 71, 79; 50 L. Ed. 939, 941.

Whether the contracts were void, as contended, is not important. *What is important is the fact that they at least were of dubious validity.* This Court specifically pointed out in its opinion that it did not need to decide whether the contracts involved specifically came within such rules, because there was clearly the general policy indicated by such cases and there was no reason why:

> "... the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from the family of contracts to which the law has given no sanction ... *the general policy being clear it is*

not for us to say the line was too strictly drawn" (emphasis supplied).

That this is the underlying rationale and the very essence of this decision is emphasized by the reference of this Court to Textile Mills in the Tank Truck Rentals, Inc. v. Comm., *supra,* as upholding "the validity of an income tax regulation reflecting an administrative distinction 'between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction.' "

To construe Textile Mills as upholding the validity of the Regulation as applied to the instant situation, where there has not been the slightest question of public morals, ethics or policy involved, is to extend it far beyond its own wording, and to disregard cardinal rules of judicial interpretation that decisions are to be construed in light of their underlying facts.

(2) *The "Re-enactment Rule" does not sustain the validity of the Regulation.*

At this point—if our argument shall have found favor—we have for consideration an expense which would customarily be regarded as both factually and legally ordinary and necessary, one not violative of any law or any public policy, ethics or morals, and certainly not violative of any public policy evidenced by governmental declaration thereof; and we have the Regulation involved upheld as valid by this Court only as applied to lobbying or legislative promotional efforts in some way violative of public law or morals. The Commissioner can here fall back in supporting his version of the regulation only upon the flimsy doctrine of "re-enactment", which is, at best, a mere aid in statutory construction; *Helvering* v. *Reynolds,* 313 U.S. 428, 432; 85, L. Ed. 1438, 1441 (1941); *F. W. Woolworth* v. *U. S.*, 91 Fed. (2d) 913, and an "un-

reliable indicium" at that; *Comm. v. Glenshaw Glass Co.*, 348 U.S. 426, 431, 99 L. Ed. 483, 490, 75 S. Ct. 483 (1955).

The "Re-enactment Rule" is neither applicable nor persuasive. If the re-enactment rule has any applicability, it would tend to sustain Petitioner's position rather than defeat it.

That doctrine, in effect, says that where there has been well settled and long continued judicial or administrative interpretation of a statute, by re-enactment of the statute Congress has given such interpretation its blessing. U. S. v. Dakota-Montana Oil Company, *infra*; McGaughan v. Hershey Chocolate Company, *infra*. By its own terms such a fiction cannot apply unless the interpretation is well settled and of long standing. We shall see that, if there was any well settled interpretation prior to 1939 (the last re-enactment before the year in question), it was not in accord with petitioner's position. We shall further see that after 1939 and prior to 1950, the year involved, there was no re-enactment, unless it could be said that by silence Congress impliedly approved the doctrine of Textile Mills (disregarding, at this point, *arguendo*, the effect of Luther Ely Smith, *infra*.) Any fictional sanction by Congress, however, of Textile Mills, is necessarily limited to its exact holding — and that case, as we have urged, did not approve the validity of the regulation as applied to this type situation.

Let us be more specific.

It is true that the regulation involved has as of today been in effect for over forty years. The first Regulation, which derived from a Treasury decision of 1915 (TD 2137 17 Treas. Dec. J.R., page 48, 57-58) was incorporated in the Regulations of 1918 (Article 143, Regulation 33, Revised). Between 1918 and 1939, when

Revenue Acts were customarily re-enacted in their entirety at intervals, there were at least nine substantial re-enactments.*

During this period there were many decisions generally allowing expenses connected with the promotion or defeat of legislation, provided they were legitimate expenses and were otherwise ordinary and necessary. In *Lucas v. Wofford*, 49 Fed. (2d) 1027, (5th Cir., 1931), the taxpayer sold a motor fuel known as Woco Pep. The Legislature met to prescribe fuel standards which Woco Pep obviously did not meet. The expense of employment of an attorney to forestall adverse legislation was held deductible, even though the attorney drafted a bill exempting Woco Pep, and appeared before the Governor, the Attorney General, and several legislative committees in explaining and advocating it. The bill exempting Woco Pep was passed. The Board of Tax Appeals had allowed the deduction (15 B.T.A. 1225), noting that the expense was made "in order to keep his business alive" and the services rendered "entirely legitimate". The Court of Appeals affirmed, holding the expenses were both legitimate and necessary to protect the taxpayer's business.

See also *George Ringler & Co.*, 10 B.T.A. 1134 (1928), allowing contributions to a brewer's association, made not only to test the constitutionality of the prohibition amendment, but also to campaign against assertions by the Anti-Saloon League that brewers were wasting food products.

In *Los Angeles & Salt Lake Railroad Company*, 18 B.T.A. 168 (1929), a contribution by the tax payer to an association, which, by advertising, (as contrasted to "lob-

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*The following Revenue Acts, all enacted between 1918 and 1939, contain complete income tax provisions, represented the entire tax for the period covered: Rev. Act of 1918, Rev. Act of 1921, Rev. Act of 1924, Rev. Act of 1926, Rev. Act of 1928, Rev. Act of 1932, Rev. Act of 1934, Rev. Act of 1936, Rev. Act of 1938.

bying") attempted to create favorable public opinion and understanding so as to avert unfavorable or injurious legislation when returning the railroads to private ownership after World War I, was held deductible—the regulation to the contrary—as made for a legitimate purpose vitally connected with the welfare of Petitioner's business, and made *"in a legal and ethical manner"*.

The Commissioner specifically urged the regulation, but the Court said:

> "It is clear that the purpose of the advertising and publicity campaign conducted by the association was to create a body of intelligent public opinion favorable to the railroads of the country, and *to avert the enactment of legislation* unfavorable or injurious to them. The campaign was made by carrying in the newspapers of the country a series of advertisements setting forth the services rendered by the railroads, the problems confronting them, and *suggesting sound legislation* and wise regulation (p. 177). . . ."

After reviewing Lucas v. Wofford and Geo. Ringler & Co., both *supra*, the Court held:

> "We are unable to perceive any vital difference between the situations in the cases cited and that which gives rise to the present inquiry. There is no difference in principle between an expenditure of money to invalidate legislation already enacted and an expenditure to avert or forestall the enactment of legislation, *assuming that in each instance the means or methods employed are legitimate.* Nor do we see any distinction between an undertaking by an individual or corporation to avert or defeat, by direct action, legislation unfavorable to or destructive of his or its business, as in the *Wofford* case, and a joint undertaking by a number of individuals or corporations to avert or defeat, by indirect action, legislation unfavorable to or destructive of

their business. We are of the opinion that the expenditure in question was for a legitimate purpose vitally connected with the welfare and for the benefit of the petitioner's business, that it was made in a legal and ethical manner, and that it was an ordinary and necessary expense of the petitioner's business within the meaning of the revenue act then in force and should be allowed as a deduction from gross income" (p. 179) (emphasis supplied).

The Court of Claims in the case of *Texas & Pacific Railway Co.* v. *United States*, 52 Fed. (2d) 1040 (Court of Claims, 1931), affirmed on other issues, 286 U.S. 295, (1932), involved the identical issue for the same year for another railroad, and it likewise, the Regulation to the contrary notwithstanding, allowed the deduction. These and similiar cases are typical of the climate of judicial opinion in the period between 1918 and 1939. *Kansas City Southern Ry. Co., et al,* 22 B.T.A. 949, 963 (1931), *reversed on other grounds,* 75 Fed. (2d) 786 (8th Cir. 1935), *remanded on second appeal,* 109 Fed. (2d) 1018 (1940); *Missouri Pacific Railroad Co.,* 22 B.T.A. 267, 287 (1931); *Norfolk Southern Railroad Co.,* 22 B.T.A. 302, 309 (1931), *reversed in part and affirmed in part on other grounds,* 63 Fed. (2d) 304 (4th Cir. 1933), cert. denied 290 U.S. 672 (1933); See also, after 1939, *Addressograph-Multigraph Corp.,* P-H T. C. Memo Decision, para. 45,058 (1945).

The case of *Sunset Scavenger Company, Inc.* v. *Comm.,* 84 Fed. (2d) 453, (1936), was thus not indicative of the majority rule at that time. As a matter of fact, the lower court in the Textile Mills case itself refused to be guided by the *Scavenger* case, 38 B.T.A. 623 (1928), but referred approvingly to *Lucas* v. *Wofford, supra,* and held to apply the Regulation as contended by the Commissioner would be an invalid misapplication of the statute.

After the Internal Revenue Code was adopted in 1939,* there was no further re-enactment of the entire statute, as had been formerly done. Changes in the law were effected by amendment of a particular section.

Textile Mills was decided in 1941.

In 1944 the Tax Court decided the case of *Luther Ely Smith,* 3 T.C. 696, involving an amendment to the Constitution by initiative petition, holding that the regulation here involved did not apply since there was no legislation, as previously noted. The Commissioner acquiesced, 1944 Cum. Bull. 26.** With the flexibility of afterthought not afforded most litigants, this acquiescence was finally withdrawn (Rev. Rule 58-255, 1958 Int. Rev. Bull. No. 21, at 16) *after* certiorari had been granted in the companion case to the one at bar, *Cammarano* v. *U. S.,* 246 Fed. (2d) 751, cert. granted, 2 L. Ed. (2d) 521.

Between 1939 and 1950, the year here involved, there has been, of course, no re-enactment of Section 23 (a) (1).†

Thus it seems clear that the only true re-enactment of this section of the tax law was made during the period 1918-1939, when the majority of the decisions were holding specifically‡ that the Regulation did not prevent deduction of expenses made to invalidate legislation or avert future enactments, even though carried on directly through contact with representatives of

*The 1939 Code has itself been regarded only as a compilation, not a re-enactment. **Helvering v. Hallock**, 309 U.S. 106, 84 L. Ed. 654, 60 S. Ct. 444, (1940), Note 4.

**If there be a difference between expenses to defeat a state constitutional amendment to be enacted by the people and an initiative measure to be enacted by the people, we are unable to perceive it.

†There was a minor change to the heading of Section 23 (a) (1) pursuant to Section 121 (a) of the 1942 Revenue Act, 1956 Stats. 819, 1942.

‡Cf also **Sanford v. Comm.,** 308 U.S. 39, 84 L. Ed. 20 (1939), where the administrative interpretation was in conflict with lower court decisions and see annotation at 84 L. Ed. 55.

the Legislature, so long as they were done in a legitimate and ethical manner. This being so, the various re-enactments should be deemed to have approved this judicial interpretation. But, at the very best, it cannot be said that there was any settled judicial construction of the Regulation, and as here indicated, it has not been re-enacted since. As we have indicated, the doctrine can apply only when the judicial or administrative construction is settled and long continued; *McGaughan* v. *Hershey Chocolate Co.*, 283 U.S. 488, 492; 75 L. Ed. 1183; *U. S.* v. *Dakota-Montana Oil Co.*, 288 U.S. 459, 466, 77 L. Ed. 893, 897; *Helvering* v. *Winmill*, 305 U.S. 79, 83, 8 L. Ed. 53. Unless the interpretation is settled, there is no reason to apply the rule. *Merten's Law of Federal Income Taxation*, Zimmett, Stanley and K. T. Culler Revision (1957), 54, Sec. 323.*

Further, the re-enactment rule can logically apply only when the regulation construing the statute is clear and unambiguous. Ambiguous regulations are of little value in resolving statutory ambiguities, *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 76 L. Ed. 587, 52 S. Ct. 275. At least until recently, *Revere Racing Ass'n* v. *Scanlon*, 232 F.(2) 816 (1 Cir.) (1956) and *Davis, Herbert*, 26 T.C. 49 (1956), long after the year in question (and even after the enactment of the 1954 Code), no case or ruling had ever specifically applied the regulation to legitimate expenses of influencing enactments made directly by the people. Indeed, the inference of Luther Ely Smith, *supra*, and the Commissioner's acquiescence therein, is to the contrary. Just what meaning the Congress may have thought it was re-enacting, with reference to the present situation, whether before or after Textile Mills, is not easy to understand.

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*As to the overall unreliability of this rule, see Merten's comments in this section and also in 3.24.

Between 1939 and 1950, the year under controversy, there has been no re-enactment. Thus, any further judicial construction during this period is not properly incorporated under the re-enactment rule. In this connection see footnote 7 to a decision of this Court, *Helvering v. Hallock*, 309 U.S. 106 (1940), where this Court said:

> "Whatever may be the scope of the doctrine that re-enactment of a statute impliedly enacts a settled judicial construction placed upon the re-enacted statute, that *doctrine has no relevance to the present problem.* Since the decisions in * * *, Congress has not re-enacted § 302 (c). The amendments that Congress made to other provisions of § 302 in connection with other situations than those now before the Court, were made without re-enacting § 302 (c). * * *"

The Court below suggested the re-enactment rule was applicable in a different sense; it felt that the Congress had acquiesced, through long silence—an approach on its face being more fraught with weakness, being, as it is, yet one further step removed from the doctrine of formal re-enactment. "We walk on quicksand when we try to find in the absence of corrective legislation, a controlling legal principle." Helvering v. Hallock, *supra*.

But if there be re-enactment here, whether by express re-enactment or by acquiescence, it seems that the re-enactment should in all events re-enact the ruling of Textile Mills as qualified and distinguished in Luther Ely Smith, *supra*, and acquiesced in by the Commissioner, his belated withdrawal to the contrary notwithstanding.

Above all, whether or not we consider the Smith case as modifying Textile Mills, or having any bearing whatsoever, the doctrine of re-enactment, whether of express re-enactment or re-enactment by acquiescence or silence, of necessity must be bound up inextricably with the true

meaning of Textile Mills. That is to say, even if the tax year here involved were 1955, so that we clearly had an express re-enactment since the decision in 1941, still it must inevitably follow that such re-enactment could incorporate and approve neither more nor less than the precise holding of Textile Mills. If Textile Mills, as we have urged, upheld the validity of the Regulation only as applied to items of doubtful morality or legality, then we are at a loss to explain how Congress could have by mere re-enactment imposed a more extended interpretation of the Regulation. On the other hand, if, as is the position of the Government, Textile Mills upheld the validity of the Regulation in its entirety and as applied to every type of lobbying or legislative expenses, legitimate or not, the resolution of the question of re-enactment becomes academic to this case, for we shall have already been foreclosed by the meaning of Textile Mills.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX

STATUTE, REGULATION, AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 23(a) (1) (A) of the Internal Revenue Code of 1939 provides in pertinent part as follows:

> "**§ 23. Deductions from gross income.** In computing net income there shall be allowed as deductions:
>
> "**(a) Expenses.**
>
> "**(1) Trade or Business Expenses.**
>
> "**(A) In General.** All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *."

2. Section 29.23 (q)-1, of Treasury Regulation 111, as it existed during 1950, provided as follows:

> "*Contributions or gifts by corporations.*— A corporation may deduct from its gross income contributions or gifts to organizations described in section 23 (q) (see section 29.22 (b) (4)-1 for definition of 'political subdivision'). Where payment is made in a taxable year beginning prior to the first taxable year beginning after the date of the cessation of hostilities in the present war, as proclaimed by the President, the charitable deduction prescribed is allowable to corporations even though the gifts or contributions are used outside of the United States or its possessions. Such deductions shall, to the extent provided by that section, be allowed only for the taxable year in which such contributions or gifts are actually paid, regardless of when pledged and regardless of the method of accounting employed by the corporation in keeping its books and records. As to charitable contributions by corporations not deductible under section 23 (a), see section 29.23 (a)-13. Sums of money expended for

lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including adverting other than trade advertising, and contributions for compaign expenses are not deductible from gross income.

"The provisions of the last paragraph of section 29.23 (o)-1, relating to (1) the statement in returns of the name and address of each organization to which a contribution or gift was made and the amount and the approximate date of the actual payment of the contribution or gift, (2) the substantiation of the claims for deductions when required by the Commissioner and (3) the basis for calculation of the amount of a contribution or gift which is other than money, are equally applicable to claims for deductions of contributions or gifts by corporation under section 23 (q)."

3. Amendment No. 7 to the Constitution of Arkansas, approved in the General Election November 20, 1920, provides in pertinent part as follows:

"No. 7. Initiative and Referendum

Sec, 1. Legislative power.—The legislative power of the people of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly; and also reserve the power, at their own option, to approve or reject at the polls any entire act or any item of an appropriation bill. . . ."

"State Wide Petitions

Initiative—The first power reserved by the people is the initiative. Eight percent of the legal voters may propose any law and ten per cent may propose a Constitutional Amendment by initiative

petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions for Statewide measures shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon; provided, that at least thirty days before the aforementioned filing, the proposed measure shall have been plublished once, at the expense of the petitioners, in some paper of general circulation. . . ."

"*General Provisions*

Definition—The word "measure" as used herein includes any bill, law, resolution, ordinance, charter, constitutional amendment or legislative proposal or enactment of any character.

No Veto—The veto power of the Governor or Mayor shall not extend to measures initiated by or referred to the people.

Amendment and Repeal—No measure approved by a vote of the people shall be amended or repealed by the General Assembly or by any City Council, except upon a yea and nay vote on roll call of two-thirds of all the members elected to each house of the General Assembly, or of the City Council, as the case may be.

Election—All measures initiated by the people, whether for the State, county, city or town, shall be submitted only at the regular elections, either State, congressional or municipal, but referendum petitions may be referred to the people at special elections to be called by the proper official, and such special election shall be called when fifteen per cent of the legal voters shall petition for such special election, and if the referendum is invoked as to any measure passed by a city or town council, such city or town council may order a special election.

Majority—Any measure submitted to the people as herein provided shall take effect and become a law when approved by a majority of the votes cast upon such measure, and not otherwise, and shall not be required to receive a majority of the electors voting at such elections. Such measures shall be operative on and after the 30th day after the election at which it is approved, unless otherwise specified in the act. This section shall not be construed to deprive any member of the General Assembly of the right to introduce any measure, but no measure shall be submitted to the people by the General Assembly, except a proposed constitutional amendment or amendments as provided for in this Constitution. . . ."

". . . *Self-Executing*—This section shall be self-executing, and all its provisions shall be treated as mandatory, but laws may be enacted to facilitate its operation. No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people. . . ."